

आयकर अपीलीय अधिकरण “ई ” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “E” BENCH, MUMBAI
BEFORE SHRI R.C. SHARMA , AM AND SHRI SANDEEP GOSAIN , JM

आयकर अपील सं./I.T.A. No. 6952/Mum/2013
(निर्धारण वर्ष / Assessment Year: 2009-2010)

ITO -25(2)(3) , Mumbai Room No. 105, 1 st floor, Bldg. No. C-11, Pratyakshakar Bhavan, Bandra Kurla Complex, Bandra (East), Mumbai-400051.	बनाम/ Vs.	Smt. Sudha Brijratan Damani A-73, Shridhar Smruti, Devidas Extension Road, Borivali (West) Mumbai – 400 103.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAAPD 5203 G.		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)
Revenue by	:	Shri G.M. Makwana
Assessee by	:	Shri Jayant R. Bhatt
सुनवाई की तारीख / Date of Hearing	:	15.10.2015
घोषणा की तारीख / Date of Pronouncement	:	21.10.2015

आदेश / O R D E R

Per Sandeep Gosain J. M.:

This appeal has been filed by the Revenue against the order of CIT(A) -35 Mumbai, dated 27-09-2013 thereby allowing the appeal of the assessee against the order of assessment u/s. 143(3) of the Income Tax Act, 1961 dated 27-12-2011, on the following grounds:-

- a. *“On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding the income of the assessee from share transaction as profits from capital gain and not as business income.”*
- b. *“On the fact and in the circumstances of the case and in law, the Ld.CIT(A) erred in not appreciating the fact that though the total transactions during the year is low, the volume of transactions is very high and the shares are bought and sold regularly within short period with an intention to earn profit with minimum risk.”*
- c. *“The appellant prays that the order of the Ld. CIT(A) on the above grounds be set aside and that of the A.O. be restored.*
- d. *“The appellant craves leave to amend or alter any ground or add a new ground.”*

However, after going through the grounds taken by the Revenue , we found that the tax effect in the present appeal is less than 4 lakhs.

3. Ld. DR was specifically asked to give working, wherein he confirmed that the tax effect in the present appeal is less than Rs.4 lakhs.

4. In view of the recent *Instruction No. 5/2014* issued by CBDT on 10-7-2014 revising monetary limits for filing of appeal before ITAT fixing the tax effect limit of Rs. 4 lacs, the same is not maintainable and liable to be dismissed in limine. The only issue now remains before us is, whether, this appeal of revenue, which is below the prescribed limit of tax effect in view of the *Board's Instruction*

No.5/2014 issued on 10-7-2014 revising the monetary limits for filing of appeals by the Department before ITAT is maintainable or not.

5. We have considered the judgment of Hon'ble Delhi High Court in the case of *CIT v. P.S. Jain & Co. (2011) 335 ITR 591* has held as under:

"This court can very well take judicial notice of the fact that by passage of time money value has gone down, the cost of litigation expenses has gone up, the assessee on the file of the Departments have been increased consequently, the burden on the Department has also increased to a tremendous extent. The corridors of the superior courts are choked with huge pendency of cases. In this view of the matter, the Board has rightly taken a decision not to file references if the tax effect less than Rs. 2 lakhs. The same policy for old matters needs to be adopted by the Department. In our view, the Board's circular dated 27-3-2000 is very much applicable even to the old references which are still undecided. The Department is not justified in proceeding with the old references wherein the tax impact is minimal. Thus, there is no justification to proceed with decades old references having negligible tax effect."

6. Similarly, Hon'ble Gujarat High Court in the case of *CIT v. Sureshchandra Durgaprasad Khatod (HUF) (2014) 363 ITR 556/(2013) 214 Taxman 59* has specifically considered *instruction No. 3/2011* and held that the same would apply to pending cases as well even though there was a specific condition in that instruction also that the same would apply to appeals file on or after February, 2011. Hon'ble High Court has considered this issue as under:—

'6. The question about applicability of Instruction No.3 of 2011 had been considered and decided by the Aurangabad Bench of the Bombay High Court in Tax Appeal No. 78 of 2007, *The Commissioner of Income Tax v. Smt. Vijaya V. Kavekar* decided on 29-7-2011. The Division Bench, after considering earlier Instructions and various decisions of the Courts on Instructions, relying on the decision in *Commissioner of Income Tax v. Madhukar K. Inamdar (HUF) (2010) 229 CTR (Bom) 77*, has held in paragraphs 9, 10, 11, 14 and 17 as under:

"9. As stated earlier, the Income Tax Act was amended and Section 268A has been introduced on the Statute book with retrospective effect. Section 268A carves out an exception for filing of appeals and References under section 260 A of the Act. The legislature has prescribed that the CBDT is empowered to issue circulars and instructions from time to time, with regard to filing of appeals depending on the tax effect involved.

Thereafter, in 2008, CBDT Instruction No. 5 of 2008 dated 15-5-2008 was issued. This Court in the case of *Commissioner of Income Tax v. Madhukar K. Inamdar (HUF) (2010) 229 CTR (Bom) 77*, interpreted the aforesaid Circular. The Circular was issued in supersession of all earlier instructions issued by the Board. The monetary limit was increased and appeals were to be filed under Section 260A, thereafter, only in cases where the tax effect exceeded Rs. 4 Lacs. Paragraph 11 of that instruction stipulated that it was applicable to appeals filed on or after 15-5-2008. It was further provided that in cases, where appeals were filed before 15-5-2008, they would be governed by the instructions on this subject which were operative at the time when such appeals were filed. The instruction was issued under section 268A(1) of the Act. The argument of the learned Counsel for the revenue in that case was, that the instruction issued on 15-5-2008 did not preclude the department from continuing with the appeals and/or Petitions filed prior to 15-5-2008, if they involved a substantial question of law of a recurring nature, notwithstanding the fact that the total cumulative tax effect involved in the appeals was less than Rs. 4 Lacs. It was submitted, such appeals which were filed prior to the issuance of

Instruction and where substantial questions of law were raised, were required to be decided on merits. The Court, while considering the issue observed that paragraph 5 of the Circular made it clear that no appeals would be filed in the cases involving tax effect less than Rs. 4 Lacs notwithstanding the issue being of recurring nature. Relying on the judgement in CIT v. Polycott Corporation, the Court observed as follows:

"6 The aforesaid judicial verdict makes it clear that the circular dt. 15-5-2008 in general and para (5) thereof in particular lay down that even if the same issue, in respect of same assessee, for other assessment years is involved, even then the Department should not file appeal, if the tax effect is less than Rs. 4 Lakhs. In other words, even if the question of law is of recurring nature even then, the revenue is not expected to file appeals in such cases, if the tax impact is less than the monetary limit fixed by the CBDT."

7. One fails to understand how the Revenue, on the face of the above clear instructions of the CBDT, can contend that the circular dt. 15-5-2008 issued by the CBDT is applicable to the cases filed after 15-5-2008 and in compliance thereof, they do not file appeals, if the tax effect is less than Rs. 4 Lakhs; but the said circular is not applicable to the cases filed prior to 15-5-2008 i.e. to the old pending appeals, even if the tax effect is less than Rs. 4 Lakhs. In our view, there is no logic behind this belief entertained by the Revenue."

The Court has further held that the prevailing instructions fixing the monetary limit for the tax effect would hold good even for pending cases. Accordingly, the Court dismissed all the appeals having a tax effect of less than Rs. 4 Lacs.

10. The new CBDT instructions have been issued on 9-2-2011, being Instruction no. 3 of 2011. The monetary limit has been raised again and clause 3 of the instructions provides that appeals shall not be filed in cases where the tax effect does not exceed the monetary limits prescribed, henceforth. The monetary limits prescribed for filing

an appeal under section 260A before the High Court has been raised to Rs. 10 Lacs. This instruction is identical to the CBDT Instruction no. 5 of 2008. Clause 10 of this circular indicates that monetary limits would not apply to writ matters and direct tax matters other than income tax. It further provides that where the tax effect is not quantifiable, the Department should take a decision to file appeals on merits of each case. Clause 11, again provides that the instruction would apply to appeals filed on or after2011 and appeals filed before2011 would be governed by the instructions on this subject, operative at the time when such appeals were filed.

11. In our opinion, when a similar clause has been interpreted by the Division Bench of this Court in CIT v. Madhukar Inamdar (Supra), the same principles must apply in the present cases also, as we have found that the instructions of 15-5-2008 is para-material with the instruction of 9-2-2011.

14. Similarly, the Delhi High Court in the case of "Commissioner of Income Tax v. Delhi Race Club Ltd.", decided on 3-3-2011, by relying on its earlier Judgement "Commissioner Income Tax Delhi-III v. M/s P.S. Jain and Co. decided on 2-8-2010 has held that the CBDT circular raising the monetary limit of the tax effect to Rs. 10 Lacs would be applicable to pending cases also.

17. It is true that this judgement in Chhajer's case (supra) was not brought to the notice of the Division Bench, while deciding either Madhukar's case (supra) or the case of Polycot Corporation (supra). However, the instruction of 2005 which was considered in Chhajer's case has also been interpreted in Polycot Corporation (supra). The consistent view of the Court has been that the CBDT instruction would apply to pending cases as well. The main objective of such instructions is to reduce the pending litigation where the tax effect is considerably small. Therefore, in our opinion, the tax appeals are required to be dismissed, as they are not maintainable in view of the provisions of section 268A of the Income Tax, and the CBDT Instruction No. 3 of 2011."

7. *The same view has been taken by the Karnataka High Court in ITA No. 3191 of 2005 in The Commissioner of Income-Tax v. M/s. Ranka & Ranka decided on 2-11-2011, wherein the Division Bench has considered Instruction No.3 and the National Litigation, Policy, had held as under:*

"(i) Instruction No.3/11 is also applicable to the pending appeals.

(ii) As the tax effect in the instant case is less than Rs.10 lakhs, the appeal stands dismissed on the ground of monetary limit, without expressing any opinion on the merits of the claim, making it clear that the Department is at liberty to proceed against the assessee in future, if there any amount due from the assessee, on similar issue and if it is above the monetary limit prescribed."

7. We find from the above case law of Hon'ble Gujarat High Court in the case of *Sureshchandra Durgaprasad Khatod (HUF)*, (supra) that in the similar situation and exactly identical instructions were applied to the retrospectively pending appeals also. Hon'ble Gujarat High Court has discussed that almost all High Courts are of the unanimous view, considering the main objective of such instructions that to reduce the pending litigation, where the tax effect is considerable low or small, the appeal is not maintainable. The recent instruction revising the monetary limit to Rs. 4 lakh for filing appeal before ITAT on income tax matters, as issued *vide Instruction No.5/2014 FNo279/Misc.142/2007-ITJ(Pt) dated 10-7-2014* will apply to pending appeals also for the reason that the same

is exactly identical to earlier instructions. The relevant circular issued by CBDT reads as under:

'Reference is invited to Board's instruction No 3/2011 dated 9-2-2011 wherein monetary limits and other conditions for filing departmental appeals (in income-tax matters) before Appellate Tribunal, High Courts and Supreme Court were specified.

2. In supersession of the above instruction, it has been decided by the Board that departmental appeals may be filed on merits before Appellate Tribunal, High Courts and Supreme Court keeping in view the monetary limits and conditions specified below.

3. Henceforth appeals shall not be filed in cases where the tax effect does not exceed the monetary limits given hereunder:-

<i>S No.</i>	<i>Appeals in Income-tax matters</i>	<i>Monetary Limits (in Rs)</i>
<i>1.</i>	<i>Before Appellate Tribunal</i>	<i>4,00,000</i>
<i>2.</i>	<i>Under section 260A before High Court</i>	<i>10,00,000</i>
<i>3.</i>	<i>Before Supreme Court</i>	<i>25,00,000</i>

It is clarified that an appeal should not be filed merely because the tax effect in a case exceeds the monetary limits prescribed above. Filing of appeal in such cases is to be decided on merits of the case.

4. For this purpose, "tax effect" means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of the issues against which appeal is intended to be filed (hereinafter referred to as "disputed issues"). However the tax will not include any interest thereon, except where chargeability of interest

itself is in dispute. In case the chargeability of interest is the issue under dispute, the amount of interest shall be the tax effect. In cases where returned loss is reduced or assessed as income, the tax effect would include notional tax on disputed additions. In case of penalty orders, the tax effect will mean quantum of penalty deleted or reduced in the order to be appealed against.

5. The assessing officer shall calculate the tax effect separately for every assessment year in respect of the disputed issues in the case of every assessee. If, in the case of an assessee, the disputed issues arise in more than one assessment year, appeal, can be filed in respect of such assessment year or years in which the tax effect in respect of the disputed issues exceeds the monetary limit specified in para 3. No appeal shall be filed in respect of an assessment year or years in which the tax effect is less than the monetary limit specified in para 3. In other words, henceforth, appeals can be filed only with reference to the tax effect in the relevant assessment year. However, in case of a composite order of any High Court or appellate authority, which involves more than one assessment year and common issues in more than one assessment year, appeal shall be filed in respect of all such assessment years even if the 'tax effect' is less than the prescribed monetary limits in any of the year(s), if it is decided to filed appeal in respect of the year(s) in which 'tax effect' exceeds the monetary limit prescribed. In case where a composite order/judgment involves more than one assessee, each assessee shall be dealt with separately.

6. In a case where appeal before a Tribunal or a Court is not filed only on account of the tax effect being less than the monetary limit specified above, the Commissioner of Income-tax shall specifically record that "even though the decision is not acceptable, appeal is not being filed only on the consideration that the tax effect is less than the monetary limit specified in this instruction". Further, in such cases, there will be no presumption that the Income-tax Department has acquiesced in the decision on the disputed issues. The Income-tax Department shall not be precluded from filing an appeal against the disputed issues in the case of the same assessee for any other assessment year, or in the

case of any other assessee for the same or any other assessment year, if the tax effect exceeds the specified monetary limits.

7. In the past, a number of instances have come to the notice of the Bard, whereby an assessee has claimed relief from the Tribunal or the Court only on the ground that the Department has implicitly accepted the decision of the Tribunal or Court in the case of the assessee for any other assessment year or in the case of any other case for the same or any other assessment year, by not filing an appeal on the same disputed issues. The Departmental representatives/counsels must make every effort to bring to the notice of the Tribunal or the Court that the appeal in such cases was not tiled or not admitted only for the reason of the tax effect being less than the specified monetary limit and, therefore, no inference should be drawn that the decisions rendered therein were acceptable to the Department. Accordingly, they should impress upon the Tribunal or the Court that such cases do not have any precedent value. As the evidence of not filing appeal due to this instruction may have to be produced in courts, the judicial folders in the office of CIT must be maintained in a systemic manner for easy retrieval.

8. Adverse judgments relating to the following issues should be contested on merits notwithstanding that the tax effect entailed is less than the monetary limits specified in para 3 above or there is no tax effect.

(a) Where the Constitutional validity of the provisions of an Act or Rule are under challenge, or

(b) Where Board's order, Notification, Instruction or Circular has been held to be illegal or ultra vires, or

(c) Where Revenue Audit objection in the case has been accepted by the Department.

9. The proposal for filing Special Leave Petition under Article 136 of the Constitution before the Supreme Court should, in all cases, be sent to

the Directorate of Income- tax (Legal & Research), New Delhi and the decision to file Special Leave Petition shall be in consultation with the Ministry of Law and Justice.

10. The monetary limits specified in para 3 above shall not apply to writ matters and direct tax matters other than Income tax. Filing of appeals in other Direct tax matters shall continue to be governed by the relevant provisions of statute & rules. Further filing of appeal in cases of Income Tax, where the tax effect is not quantifiable or not involved, such as the case of registration of trusts or institutions under section 12 A of the IT Act, 1961, shall not be governed by the limits specified in par 3 above and decision to file appeal in such cases may be taken on merits of a particular case.

11. This instruction will apply to appeals filed on or after 10-7-2014. However, the cases where appeals have been filed before 10-7-2014 will be governed by the instructions on this subject, operative at the time when such appeal was filed.

12. This issue under section 268A (1) of the Income-tax Act 1961.'

8. Considering the above judicial pronouncements, we found that this appeal of the revenue is not maintainable as the tax effect in this appeal is below Rs.4 lakhs. Even on merits we found that as per the findings recorded by CIT(A) profit earned on sale of share are liable to be taxed as short term capital precise findings of CIT(A) is as under:-

"I have gone through the A.O's contentions and the submission of the appellant. The main contentions of the A.O. are that the appellant has carried out purchase and sale transactions of shares on a large scale and that the scrips were held for a very short period and also the A.O. has focused on the fact that the appellant has in the earlier year also been engaged in the activity of share trading and so the activities are of recurring nature. From the submissions of the appellant, however some

critical facts emerged. In the entire year only 9 sale transactions are seen and the total volume of transactions including the purchase and sale is at Rs. 73,69,994/- . In the context that the appellant's own capital is Rs. 2,98,31,760/- and that only 9 scrips were traded in the whole year, it cannot be inferred that the volume of frequency was inordinately high. It is also seen that majority of shares were held for more than 6 months. Also in terms of the value of the total purchase and sale of shares, it seen that the appellant has earned nearly 64.49% in terms of return of investment and at the percentage it cannot be inferred that trading was that frequent for the sale purchase volume in terms of price to be very close to each other. In the background of the facts of the case, I am inclined to agree with the appellant that the engagement in the trading of shares is in the nature of investment for the purpose of generating capital gains and is not to be held as income from business. The appellant gets relief accordingly."

The above findings of CIT(A) has not been controverted by Id. D.R. by bringing any positive material on record. Accordingly, we do not find any reasons to interfere in the findings so recorded by CIT(A), treating the gain on sale of shares as short term capital gain. Accordingly, we dismiss the appeal of the revenue.

9. In the result appeal of the Revenue is dismissed.

Order pronounced in the open court on *October 21st, 2015*

Sd/-
(R.C. Sharma)

लेखा सदस्य / Accountant Member

Sd/-
(Sandeep Gosain)

न्यायिक सदस्य / Judicial Member

मुंबई Mumbai; दिनांक Dated : 21.10.2015

PS:- Pooja

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai

Sr. No.	Details	Date	Initials	Designation
1	Draft dictation sheets are attached	Yes		Sr.PS/PS
2	Draft dictated on	16.10.2015		Sr.PS/PS
3	Draft Placed before author	16.10.2015		Sr.PS/PS
4	Draft proposed & placed before the Second Member			JM/AM
5	Draft discussed/approved by Second Member			JM/AM
6	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
7	Order pronouncement on			Sr.PS/PS
8	File sent to the Bench Clerk			Sr.PS/PS
9	Date on which the file goes to the Head clerk			
10	Date on which file goes to the AR			
11	Date of Dispatch of order			